(3)

No. 89-1042

In the Supreme Court of the United States

OCTOBER TERM, 1989

ANNY NEWMAN,
PETITIONER,
v.
DIANA BURGIN, RICHARD M. FREELAND, ROBERT A. GREENE AND ROBERT A. CORRIGAN,
INDIVIDUALLY AND IN THEIR CAPACITIES AS OFFICERS OF THE UNIVERSITY OF MASSACHUSETTS AT BOSTON,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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I

QUESTION PRESENTED

Whether state university administrators were entitled to qualified immunity from a civil rights suit for money damages brought by a university professor they had censured for plagiarism, where despite claims of violations of due process the plaintiff was given fair notice and ample opportunity to respond to the charges and was never able to articulate *any* procedural protection (whether or not clearly established) of which she was improperly deprived, and where the decision to censure her was based on substantial evidence and clearly related to the interests of the university.

PARTIES

The captions of the Petition and of this Brief in Opposition list all parties to the proceeding in the Court of Appeals. Although the caption in that Court listed the Commonwealth of Massachusetts as a defendant-appellee, the Commonwealth had earlier been dismissed as a defendant in the District Court through amendment of the complaint. See generally *Newman* v. *Commonwealth of Mass.*, 115 F.R.D. 341, 342 (1987). The amended complaint which was the subject of respondents' motion for summary judgment and of the appeal did not name the Commonwealth as a defendant.

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Opinions Below

The opinion of the District Court is unreported. It is reproduced at pp. 1-2 of the Appendix to the Petition. The opinion of the Court of Appeals for the First Circuit is reported at 884 F.2d 19 and is reproduced at pp. 3-27 of the Appendix to the Petition; the order denying rehearing appears at p. 28 of the Appendix to the Petition.

Jurisdiction

The judgment of the United States Court of Appeals for the First Circuit was entered on August 28, 1989 (see p. 27 of App. to Petition). The petitioner's petition for rehearing and suggestion for rehearing in banc, filed on or about September 11, 1989, were denied on September 25, 1989 (*id.* at p. 28). The Petition (at p. 2) otherwise adequately sets forth the grounds for jurisdiction.

Constitutional and Statutory Provisions

The pertinent provisions of Section 1 of the Fourteenth Amendment to the United States Constitution and of 42 U.S.C. § 1983 are set forth at p. 29 of the Appendix to the Petition.

Statement of the Case

Petitioner Anny Newman is a tenured professor in the Russian Department at the University of Massachusetts at Boston, a state institution. She filed a civil rights action under 42 U.S.C. § 1983, with pendent state claims in civil rights and tort, against four administrators of the University. The petitioner alleged that the respondents had violated her rights to procedural and substantive due process in the course of proceedings which had culminated in the University's censure of petitioner for "seriously negligent scholarship" based on her having published an article that was found to have been plagiarized.

Petitioner Newman included in her annual faculty report for the 1982-83 academic year the fact that she had published an article about a 17th-century Serbo-Croatian poem. After reviewing the annual report and reading a copy of petitioner's article, respondent Diana Burgin, Chairperson of the Russian Department, notified members of the department's personnel

committee that she had perceived resemblances between the petitioner's article and a book published in German in 1952 by Vsevolod Setschkareff. The personnel committee notified the petitioner about the perceived resemblances on or about November 22, 1983. A few weeks later the committee communicated its concerns to respondent Richard Freeland, Dean of the College of Arts and Sciences, who discussed the matter with petitioner and agreed not to take any further action until she had filed a written response. In mid-March, 1984, petitioner filed a detailed response which she captioned a "Refutation." In it she asserted that her recently published article was a revision of the master's thesis she had submitted at Harvard University in 1962, that her thesis advisor had assigned the Setschkareff book to be used as a source, and that she had consulted with Setschkareff himself in the course of her research on the thesis. The "Refutation" also included analysis of the challenged sections of her article with references and quotations from the subject poem and other sources, much of which was rendered without translation in Serbo-Croatian or German.

Respondent Freeland decided to seek outside, expert advice before deciding whether to initiate any disciplinary proceedings against petitioner. He sent the plaintiff's article and thesis, with all identifying material deleted, and the Setschkareff book to two Serbo-Croatian scholars outside the University of Massachusetts and asked them for their judgment, based on the texts alone, whether plagiarism was involved. One of the outside experts concluded that petitioner had plagiarized. The other expert described her method of documentation as substandard, as "able but less than meticulous scholarship produced by a highly impressionable and freely acquisitive writer. . . ." He thought, however, that it would be a "difficult, distasteful and thankless task to try to prove . . . conscious, deliberate and outright plagiarism." Respondent Freeland provided petitioner with the experts' reports and invited her response; she did not respond.

In early 1985, after receipt of the reports, respondent Freeland appointed a special faculty committee to hear the case and advise him whether plagiarism had occurred and whether any sanctions should be imposed upon the petitioner. The petitioner was notified of the evidence to be considered by the special committee, was allowed to call witnesses and submit evidence in her own behalf, and cross-examine any witnesses called by the committee. She was also allowed to have a faculty colleague of her choice appear with her at the hearing.

After its hearing, the faculty committee reported to respondent Freeland its conclusion that petitioner's article and thesis represented "an objective instance of plagiarism."[1] Because of what it deemed mitigating circumstances, however, the committee recommended that petitioner only be censured for "seriously negligent scholarship."

The petitioner was provided with a copy of the committee's report and allowed the opportunity to respond in writing. After receiving her memorandum, respondent Freeland submitted a written recommendation to respondent Robert A. Greene, Provost of the Boston campus, wherein Freeland adopted the findings and recommendations of the committee and proposed several specific actions for implementing the censure. These included public reading of a letter of censure before two bodies of the university faculty, sending notice of the findings to Harvard University and the publisher of the petitioner's article, and prohibiting petitioner from serving as chair of her department or voting on the award of degrees. Respondent Greene, after allowing petitioner to respond to Freeland's recommendation, forwarded the proposal with his

[1] See App. 6, 884 F.2d at 21. Petitioner's assertion at p. 9 of the Petition that the committee found that she "had not committed 'plagiarism'" is only the most egregious misstatement in an often fanciful version of the facts. Page 225 of the record appendix in the Court of Appeals is page 4 of the committee's report and is reproduced at p. 10 *infra*. Having quoted a definition of plagiarism and recited its conclusion that petitioner's article and thesis was an "objective instance of plagiarism," the committee stated: "Indeed, every form of plagiarism listed in the above definition appears in Professor Newman's article/thesis."

approval to respondent Robert A. Corrigan, Chancellor of the Boston campus. After again allowing petitioner to respond in writing, respondent Corrigan in October, 1985, effected the censure of the petitioner in the manner that had been recommended.

Petitioner filed an action in the United States District Court under 42 U.S.C. § 1983, seeking money damages and injunctive relief, with pendent claims under a state civil rights law (Mass. Gen. Laws, c. 12, § 11I) and tort claims against respondent Burgin.[2] Respondents filed a motion for summary judgment which included a claim of qualified immunity from money damages. The District Court denied the motion, holding, with respect to the civil rights claims, that whether respondents failed to provide petitioner with due process was a factual matter for the jury to decide. (App. 1.) On appeal by the respondents, the Court of Appeals reversed so much of the District Court's order as denied them qualified immunity on the due process claims. (App. 26.)

Reasons for Denying the Writ

I. The Case Presents No Split Of Authority Requiring Resolution By This Court.

The decision of the First Circuit in this case represents no departure from the pertinent decisions of this Court and no split of authority from decisions in the other circuits. The First Circuit expressly followed *Anderson* v. *Creighton*, 483 U.S. 635 (1987), in analyzing the respondents' entitlement to qualified immunity. (See App. at 11, 13, 20.) The court also followed well-established precedent in analyzing the petitioner's due process claims (see App. at 11-13); indeed, its treatment of the

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[2] The state civil rights claims were treated by the Court of Appeals and all parties as correlative with § 1983 for all purposes material to the petition in this Court. (See Petition at 3; App. at 9, n. 3.) The tort claims are not presently material in light of their disposition by the Court of Appeals.

substantive due process issue was markedly generous to petitioner's position in comparison with other circuits. (See App. at 16-19 and n. 9.) There is nothing presented in the case which offers this Court an occasion to clarify or develop any important principle of broad applicability.

Petitioner's assertion that the First Circuit failed to follow precedents of this Court, and also differed with decisions of other circuits, depends upon a tortuous argument which confuses disagreements over the legal appropriateness of procedures with genuine disputes as to material facts. As the Court of Appeals recognized (App. at 12, 20-23) there is no dispute as to any fact material to the issue of qualified immunity. Petitioner argues that the question whether respondent Freeland "should" have sent her "Refutation" to the outside experts "was a starkly *disputed fact.*" (Petition. at 14-16, emphasis in original.) But whether the dean "should" have followed a particular procedure — *i.e.*, whether he was required to do so by the dictates of due process — is by its very nature an issue of law, not of fact. See, *e.g.*, *Cleveland Bd. of Educ.* v. *Loudermill*, 470 U.S. 532, 541-542 (1985).

The decisions from other circuits, from which the petitioner claims the First Circuit differed, all involve disputes as to matters of fact, as distinguished from law. *Waldrop* v. *Evans*, 871 F.2d 1030 (11th Cir. 1989), involved a conflict of medical opinion as to the quality of treatment rendered in the case, not a dispute as to the requirements of due process. *Geter* v. *Fortenberry*, 882 F.2d 167 (5th Cir. 1989), concerned a dispute whether a police officer had procured false identifications and concealed evidence. *Pleasant* v. *Lovell*, 876 F.2d 787 (10th Cir. 1989), found a conflict of evidence as to whether IRS agents knew and authorized what a non-employee investigator was doing. Similarly, all the other cases cited by petitioner as being in conflict with the First Circuit (Petition at 19-21) either involved genuine issues of material fact, as opposed to disputed issues of law, or are not germane at all.

The two questions of due process which petitioner seeks to bring to this Court are, first, whether respondent Freeland should have sent petitioner's "Refutation" to the outside experts before he had decided whether or not to initiate proceedings (Petition at 14-16) and, second, whether Freeland should have followed certain procedures allegedly prescribed by the University's "Red Book" personnel regulations (*id.* at 6-7, 16). Neither issue has any apparent applicability beyond the circumstances of this case, and neither demonstrates any split of authority among the lower courts requiring resolution by this Court.

II. The Decision Of The Court Of Appeals Was Correct On The Qualified Immunity Issue.

The First Circuit properly held that the respondents were entitled to immunity from money damages unless petitioner could show that they had violated her rights under clearly established law. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982); *Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985); *Anderson* v. *Creighton*, 483 U.S. 635 (1987). Indeed, petitioner was unable to show, or raise any legitimate factual dispute, that respondents had violated any of her rights at all. As the circuit court noted, "[i]ndeed, on this record the adequacy of process would seem clear." (App. at 15.)

The petitioner makes two principal claims regarding the procedures followed by respondents in investigating the question of plagiarism. First, she asserts that in sending out the texts to the two outside experts, preliminary to making any decision whether to even initiate proceedings against petitioner, respondent Freeland was bound by due process to send them her "Refutation" as well. Since what the Dean was looking for was an expert analysis of the texts, divorced from any question of personalities or institutions, sending the "Refutation," which relied in significant part on just such questions, would have defeated the purpose. Moreover, far from showing

that it was "clearly established" that due process required him to send the "Refutation," petitioner has been unable to cite any case at all where an opportunity to "respond," not to the decision-making tribunal, but to potential witnesses in the case, was required before proceedings had even begun. The First Circuit properly recognized that due process did not demand any such thing. (App. at 13-14.)

The second procedural flaw claimed by petitioner is the alleged failure of respondent Freeland to follow the University's "Red Book" personnel procedures. (See Petition at 6-7, 16.) However, as recognized by the Court of Appeals (App. at 21 n. 9), there was no evidence in this case that the "Red Book" procedures applied. Contrary to petitioner's assertion in this Court (Petition at 6) respondent Freeland never "admitted" that the plagiarism inquiry was governed by the "Red Book" or that it was a "major personnel action" as defined in that document. Rather, Freeland analogized the case to a major personnel action for his own guidance in formulating procedures to be followed in an unprecedented matter that was not governed in many respects by existing regulations. (Respondent Freeland's deposition testimony, pp. 431-433 of the record appendix in the Court of Appeals, is reproduced at pp. 11-12 *infra*.) And in terms of the essential feature of the Red Book policy, seeking the advice of appropriate faculty, Freeland did indeed follow analogous procedures. Even, however, if Freeland failed to follow an applicable University policy or regulation, that failure does not by itself amount to a violation of due process. *Board of Curators of Univ. of Mo.* v. *Horowitz*, 435 U.S. 78, 92 n. 8 (1978); see also *Davis* v. *Scherer*, 468 U.S. 183, 193-196 (1984). As the First Circuit held, "on this record the adequacy of process would seem clear." (App. at 15.)

The petitioner also argues that a denial of substantive due process is involved, through what she calls a "litany of unfairnesses." (Petition at 22.) Since she has been unable to specify even a single "unfairness" that would violate due process, it is difficult to understand how this litany is composed. In essence

she simply argues that because the result of the hearing procedure was adverse to her, it must have been unfair. However, the First Circuit properly analyzed the substantive due process questions under pertinent decisions of this Court (see App. at 19-23) and correctly concluded that the respondents' decisions consisted of the exercise of professional academic judgment and were based on substantial evidence. There was no evidence that could support a finding that they were arbitrary or capricious.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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ADDENDA

[225] * * *

2. Findings of the Committee.

Plagiarism is defined in the following terms by the *MLA Handbook for Writers of Research Papers, Theses, and Dissertations* (New York: Modern Language Association, 1977; p. 4):

> Plagiarism may take the form of repeating another's sentences as your own, adopting a particularly apt phrase as your own, paraphrasing someone else's argument as your own, or even presenting someone else's line of thinking in the development of a thesis as though it were your own. In short, to plagiarize is to give the impression that you have written or thought something that you have in fact borrowed from another.

Setting aside (as this definition seems to do) issues of context, motive, and extenuating circumstances, the Committee, after careful review of Professor Newman's article/thesis and comparable passages in Professor Setchkareff's book *Die Dichtungen Gundulics und ihr Poetischer Stil* (Bonn, 1952), concludes that Professor Newman's article/thesis is an objective instance of plagiarism. Indeed, every form of plagiarism listed in the above definition appears in Professor Newman's article/thesis.

* * *

[431] * * *

Q. But after they do whatever they've done precipitating their coming to you in December and reporting their belief as then indicated by their entry in the evaluation report that her scholarship entry for that year is marred, at any rate, questionable, let's say, would they then have any further obligation to do anything, they as an ad hoc departmental personnel committee?

A. Well, I think at that point we start to move into a universe where procedures are not well charted. This was the first instance of this type that I have been involved with in my years of deaning at UMass. I think it was — there have been very few such instances, so that I think

[432] * * *

any precedence existed as to how to handle an accusation of this nature?

A. Yes, sure, we talked about that.

Q. And there weren't any, is that right?

A. There weren't any that we could find or recall.

Q. And am I also correct that under the, at least, established — I'll use guidelines only as a communicative word, that various printed regulations of the University I have that there wasn't anything, apparently, that looked to or applied to a situation like this?

A. Well, in my own mind the appropriate analogy, since there was no specific guideline, was to our way of dealing with major personnel actions.

Q. Like a tenure question or something like that?

A. That's right. And I adopted the rule for myself, in the absence of a precise guideline, that I would follow procedures at every step of the way analogous to those that would be appropriate in a major personnel action.

Q. All right. But it was necessary, given [433] the nature of what existed in the way of written guidelines or assistance to you, that you needed to analogize to some other sort of question being raised, right?

A. That's right. Hang on one second.

(Witness consults with counsel.)

A. In March of 1985 we were discussing the fact that the University's academic personnel policy which was established, revised in 1976, referred back to a predecessor personnel policy established in 1964 under which acts of dismissal against faculty members were included in the array of major personnel actions, and that when the 1976 redraft occurred, the 1964 provisions with respect to dismissal were left in force, was one aspect of the 1964 document that was not revised. And so in addition to making the analogy to a major personnel action based on the 1976 policy, that was reinforced by the fact that under the 1964 policy dismissal was considered major personnel action. And since dismissal was a possible extreme end outcome of this procedure, you know, that seemed a relevant consideration for us in thinking about how to handle it.

* * *